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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 277

THE UNITED STATES, PETITIONER

v.

MORRIS ABRAMS AND HOWARD ABRAMS, INDIVIDUALLY AND AS CO-PARTNERS D/B/A CURTIS KEY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit, entered in the above cause on May 19, 1952.

OPINIONS BELOW

No opinion was rendered by the district court. The opinion of the court of appeals (R. 19-23) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1952 (R. 19). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the Renegotiation Board had power to fix at 6% the interest to which the Government was entitled on excessive profits withheld from the Government after the date set in the Board's demand for payment, or whether the interest rate was discretionary with the court in which the United States might bring suit.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Second Renegotiation Act, Title VII, Revenue Act of 1943, 58 Stat. 78, Act of February 25, 1944, 50 U. S. C. App. 1191(c), (e), read as follows:

> § 403(c) (2) Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by the Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive

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> profits actually paid to him; or (E) by any combination of these methods as is deemed desirable [50 U. S. C. App. § 1191(c)]
>
> § 403(e)(1) * * * The filing of a petition under this subsection [relating to the proceedings before the Tax Court to redetermine excessive profits] shall not operate to stay the execution of the order of the Board under subsection (c) (2). [50 U. S. C. App. § 1191(e)]

The War Contracts Price Adjustment Board on October 6, 1944, issued a regulation (Renegotiation Manual § 626.2(3); 9 Fed. Reg. 12847, § 1606.626 (b)(3)) reading as follows:

> Interest at the rate of 6% per annum accrues upon the amount determined as excessive profits to be eliminated less the tax credit, if any, from and after the date fixed in the demand for payment.[1]

STATEMENT

Representatives of the War Contracts Price Adjustment Board (hereinafter called the Board) gave respondents notice of proceedings to determine their excessive profits under the Renegotiation Act for the fiscal year ending January 31,

---

[1] Earlier publicity had been given the requirement of 6% interest when the approved forms for bilateral agreements and unilateral orders, which contained provisions requiring the payment of interest at 6% per annum, were published in the Federal Register on July 28, 1944, 9 Fed. Reg. 9117, 9118.

The regulation in the text is applicable in the instant case. It followed the established pattern of the regulations issued earlier under the Renegotiation Act of 1942 as published in the Joint Renegotiation Manual of the Joint Price Adjustment Board, § 622.

1944. Following such proceedings, a unilateral determination and order of the Board's Chairman, dated August 3, 1945, and forwarded to respondents on that day, fixed respondents' excessive profits at $72,500.00, less adjustment for taxes. (R. 4-7.) On October 15, 1945, no review having been requested, the Board notified respondents that the determination had been adopted as its own, and made demand for repayment of the excessive profits, less applicable tax credits. Respondents were informed that interest would accrue at 6% per annum from October 30, 1945. (R. 8-9.)

Respondents having failed to repay the excessive profits, the United States filed suit in the Northern District of Ohio on February 13, 1950, for the excessive profits (less applicable tax credits and less a small amount withheld from an amount due respondents), with interest at 6% until the date of payment (R. 2-4). Respondents' answer raised a question as to special amortization, subsequently waived, and proposed limiting the interest rate to 2½% on the ground that the value of the use of the money to the United States did not exceed that figure (R. 9-10).

While the Government's motion for summary judgment (R. 11) was under advisement, respondents tendered the amount of the principal, reserving the rate of interest for decision (R. 12). The district court entered judgment on February 19, 1951 for $6,348.14, representing interest at 3% to the date of payment (R. 12). No opinion was

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written. An appeal was taken from the denial of interest at 6% (R. 13, 14).

The court of appeals affirmed, holding that the district court had discretion to fix the interest rate, whereas the Board was without authority to regulate it (R. 19-23). Because of the Government's delay in filing suit and the respondents' prompt payment of the principal thereafter, the court of appeals reasoned, the district court was warranted in limiting the interest to 3%, the rate at which the Government could borrow money. Moreover, the court concluded (R. 23), "As the amount of interest was discretionary with the court, the fact that no specific reason for its action is given is immaterial."

REASONS FOR GRANTING THE WRIT

1. In denying the Board's power to regulate the interest payable to the Government on excessive profits retained by a contractor after their return has been demanded, the decision below is, as the court recognized (R. 23), in square conflict with the decision of the Court of Appeals for the Third Circuit in *United States* v. *Philmac Mfg. Co.*, 192 F. 2d 517.[2] And the issue which has led to these conflicting decisions is an important one. As of July 1, 1952, there were 468 unsettled claims by the Government for recovery of excessive profits, involving principal amounts totaling over $50,000,000, of which approximately 200 are now in litiga-

[2] In accord with the decision below, though the issue was not so sharply crystallized as it is here (see *United States* v. *Philmac Mfg. Co.*, *supra*, at 520), are *United States* v. *Bonnell*, 180 F. 2d 145, 148 (C. A. 9), and *United States* v. *Star Const. Co.*, 186 F. 2d 666, 669 (C. A. 10)).

tion. These claims, arising under the Second Renegotiation Act, pose the question presented here as to the Board's power to fix the rate of interest. While this question remains in doubt, incentives to voluntary payment of the Government's claims are offset and encouragement is given to "wider noncompliance" (*United States* v. *Ruzicka*, 329 U. S. 287, 293) by the frequently appreciable advantages contractors may anticipate from retaining their excessive profits pending litigation as to the appropriate interest rate.[3] Thus, despite the establishment of a 4% rate by the Act of March 23, 1951, Section 105(b) (2), 65 Stat. 7, 50 U. S. C. App., Supp. V, 1215(b)(2), there continues to be a pressing need for an authoritative determination by this Court.

2. The court below has erred in its holding that the Board, unquestionably empowered to determine the principal amount of a contractor's excessive profits, lacks power to fix an interest rate chargeable for failure or refusal to surrender such profits. This holding ignores and defeats the overriding congressional purpose to effect speedy, expeditious recapture of excessive profits; it dismisses as insignificant the evidence of congressional approval, by reenactment of the Act without change, of the administratively fixed interest rate; it substitutes dispersed, unpredictable, varying results, inviting litigation, for the certainty and unformity of a rule based upon informed administrative judgment.

[3] The present case is a perfect illustration. After retaining for almost five years the profits which had been found excessive, respondents litigated only the question of the interest rate to which the Government was entitled (R. 12).

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The Renegotiation Act in "its entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage * * *." *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 770. "The primary need for speed and definiteness in these matters" [4] can only be served by empowering the Renegotiation Board authoritatively to state the account for principal and interest due, thereby expediting collections by repayment, obviating the need for the Government to resort to litigation except in extraordinary cases, and taking the profit out of withholding excessive profits. The broad delegation could not stop short of the incidental, but essential, power to determine the amount due for interest.[5]

Plainly designed for summary recovery of excessive profits, not only to regain such sums for public purposes but to "eliminate" or deny them to the profiteering contractor,[6] the statutory plan is instinct with the rule-making power needed to make speedy

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[4] *Lichter* v. *United States*, 334 U. S. 742, 791.

[5] "* * * the power that creates the obligation can assign the measure of its delinquency—the detriment of delay in payment * * *." *United States* v. *Childs*, 266 U. S. 304, 308; *cf. Am. Iron Co.* v. *Seaboard Air Line*, 233 U. S. 261, 268. "* * * interest is a concomitant very nearly automatic." *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1, 6.

[6] See the affidavit of Under Secretary of War Patterson, par. 7, reprinted in *Lichter* v. *United States*, 334 U. S. 742, 763, n. 7; *United States* v. *Strontium Products Co.*, 68 F. Supp. 886, 888 (S. D. W. Va.). By way of contrast, in tax cases, denial of the moneys to the taxpayer is not in itself a primary objective.

administrative collection a reality. *Cf. Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 258, n. 21. This power was plainly sufficient to justify the Board's adoption of a fixed rate of interest, preventing the uncertainties of case-by-case determination and precluding the delays of speculative litigation over the Government's funds.[7] For there is "a presumption against a construction that would render a statute ineffective or inefficient" (*Bird* v. *United States*, 187 U. S. 118, 124; *cf. United States* v. *Bailey*, 9 Pet. 238, 255; *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 213) and a corollary principle that "meaning, though not explicitly stated in words, may be imbedded in a statutory scheme." *United States* v. *Ruzicka*, 329 U. S. 287, 292; *cf. S. E. C.* v. *Joiner Corp.*, 320 U. S. 344, 350-351; *Helvering* v. *Gregory*, 69 F. 2d 809, 810-811 (C. A. 2), affirmed, 293 U. S. 465. Substituting strict "literalism" [8] for sympathetic effectuation of the legislative objective, the court below has failed to see that "we have here a typical case for upholding an administrative regulation." *United States* v. *Philmac Mfg. Co., supra*, at 520.

This conclusion is supported, not only by the clearly stated congressional purpose, but by the fact that Congress gave its tacit approval to the Board's interest requirement. *Ibid.* Before the extension of the Act on June 30, 1945, 59 Stat. 294, the House

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[7] The "central clue to the Board's powers" is "effectuation of the policies of the Act." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 191.

[8] See *United States* v. *Dotterweich*, 320 U. S. 277, 284; *Johnson* v. *United States*, 163 Fed. 30, 32 (C. A. 1).

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Committee considering it was repeatedly referred to the regulation calling for 6% interest.[9] Reenacting the Act without change, Congress demonstrated that it "knew what the administrative body was doing and did not itself do anything about it." *United States* v. *Philmac Mfg. Co., supra*, at 520. "If the legislative body had considered the [Board's] interpretation erroneous it would have amended the [Act]. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute." *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273. See also *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492-493.

3. The error of the court below is highlighted by the standards it invoked to justify substitution of a 3% interest rate for the 6% required by the Board's regulation. For one thing, the court observed (R. 23), the Government had not filed suit to recover respondents' excessive profits for over four years after the administrative determination. But this suggestion, suspiciously close to an untenable theory that the Government is estopped[10] or pun-

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[9] The existence of the regulation was called to the attention of the House Committee on Ways and Means by Under Secretary of War Patterson and the Chairman of the Board, copies of the regulation were furnished to members of the Committee, Congressman Eberharter specifically referred to the practice, and the National Association of Manufacturers, in recommending a change in the interest paid on refunds, drew the Committee's attention to the regulation. Hearings before Committee on Ways and Means on H. R. 2628, 79th Cong., 1st sess., pp. 17, 65, 92-93, 173, 222.

[10] *Cf. Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380.

ishable for the laches of its officials,[11] could have no relevance in any event. Wholly apart from the special protections available to the United States, the court has overlooked the dispositive fact that "responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor." *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296. See also *United States* v. *United States F. & G. Co.,* 236 U. S. 512, 528. Ignoring the statutory objective, and emphasizing the delay in bringing suit rather than the the delay in payment, the decision below leaves out of account the role of interest in removing any profit or inducement to the debtor to continue to withhold. See *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.,* 245 N. Y. 1, 5-6. The result is to put an unwarranted "premium on dilatory tactics * * *." *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 404.

Unlike the 3% rate adopted without explanation by the district court, the 6% required by the Board's regulation, while it is not punitive,[12] implements the congressional purpose by discouraging retention of

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[11] *Cf. Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *United States* v. *Summerlin,* 310 U. S. 414; *United States* v. *Thompson,* 98 U. S. 486. The absence of prejudice to respondents, who could never have had any doubt as to the Government's intention to insist on payment, dispels any conceivable predicate for laches. *Gardner* v. *Panama R. Co.,* 342 U. S. 29, 31.

[12] Both in Ohio, where this suit was brought, and in the District of Columbia, 6% is the legal rate of interest. Page's Ohio Gen. Code Ann. (1938) § 8305; D. C. Code (1940) § 28-2701.

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excessive profits. In sharp contrast with this overriding consideration, the court below found support for the district court's view in the fact that the Government, while respondents withheld its funds, "had adequate sources of credit through which it could obtain money at three per cent interest" (R. 23). It is argued, in other words, that renegotiation debtors should enjoy a forced loan from the Government, together with the benefit of the Government's credit rating. *Cf. Meilink* v. *Unemployment Comm'n,* 314 U. S. 564, 567. The argument omits entirely, not only the public injury where the objectives of the renegotiation program are thwarted (*cf. Yakus* v. *United States,* 321 U. S. 414, 440), but even the fact that the Government, while it receives the nominal interest rate from its debtor *less* the cost of servicing the claim for excessive profits, pays the nominal interest rate when it borrows *plus* the cost of floating and servicing its loan.[13] Thus, the assumed equivalence is an illusion from every point of view.

The fallacious grounds advanced to support the result below merely illustrate the propriety of the Board's uniform regulation, based upon concentrated administrative experience with the problems of renegotiation. In the scheme of the Renegotiation Act, the courts are not an integral part of the collection machinery, as they were under the Emergency Price Control Act. *Cf. Hecht Co.* v. *Bowles,*

[13] See *Meilink* v. *Unemployment Comm'n, supra,* at 567-568; Frank H. Knight, *Interest,* 8 Encyclopedia of the Social Sciences 131, 140-141.

321 U. S. 321, 331; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Their role in eliminating excessive profits is residual, stemming solely from the fact that recovery must be by suit where repayment or credit is impossible. Because litigation is dispersed, the courts have not gained specialized experience in fixing interest rates on renegotiation claims. Indeed, the judicial determination of the applicable interest rate is generally only perfunctory and incidental to the determination of more important questions. See *Laycock* v. *Parker*, 103 Wis. 161, 178. In this very case the district court took no evidence; it had the advantage of no knowledge or resources denied the Board; it gave no reason for its action (R. 12).

To require numerous suits in a great number of district courts merely to litigate the interest due on claims otherwise remitted to administrative determination is both wasteful and destructive of a centralized national program. The Board, by reason of its familiarity with the problem, is the agency most competent and strategically placed to develop a rule of broad general application for implementing the congressional policies. It should not be precluded from taking prompt and definite action by the ruling that, despite the congressional objects of "uniformity of administrative policy and disposition, expertness of judgment, and finality in determination," [14] the rate of interest was unaccountably excepted from the delegation to the Board [15] and left to be handled case by case in the courts.

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[14] *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767-768.
[15] *Cf. American Power Co.* v. *S. E. C.*, 329 U. S. 90, 106.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 277.

THE UNITED STATES,
Petitioner,

v.

MORRIS ABRAMS and HOWARD ABRAMS,
Individually and as Co-Partners d.b.a.
Curtis Key Company,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OCTOBER TERM, 1952.

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MORRIS ABRAMS and HOWARD ABRAMS,
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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Court of Appeals is part of the Record (19-23).

JURISDICTION.

The jurisdictional requisites are as set forth in the Petition.

QUESTION PRESENTED.

Do the Federal Courts have power to fix the rate of interest, in actions before them to recover a renegotiation refund under the Second Renegotiation Act (1943), or are they bound by a regulation of the War Contracts Price

Adjustment Board, when no power is given to the Board by the statute, to make such regulation?

STATUTES AND REGULATIONS INVOLVED.

A portion of the Second Renegotiation Act is accurately set forth in the Petition. The statute contains no provision for the payment of interest. The statute confers upon the Board no broad or general power to make regulations; the only authority in the Act, to issue regulations is as follows: (Title VII, Rev. Act of 1943, 58 Stat. 78, 50 U. S. C. App., Sec. 1191).

> Sec. 1191 (c) (5) (A). "Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, in such form and detail as the Board may by regulation prescribe, file with the Board on or before the first day of the fourth month following the close of the fiscal year (or if such fiscal year has closed on the date of the enactment of the Revenue Act of 1943, on or before the first day of the fourth month following the month in which such date of enactment falls), a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this section. In addition to the statement required under the preceding sentence, every such contractor or subcontractor shall, at such time or times and in such form and detail as the Board may by regulations prescribe, furnish the Board any information, records, or data which is determined by the Board to be necessary to carry out this section. * * *"
>
> Sec. 1191 (d) (5). "* * * The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the

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various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases to be conducted initially by the Board itself. * * *"

Sec. 1191 (i) (2). "The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a) (7)."

None of the sections referred to relate to interest.

STATEMENT.

On October 15, 1945, the War Contracts Price Adjustment Board issued a unilateral order (R 8-9) to Respondents to refund, for the year ending January 31, 1944, an amount which, after tax credit and an amount withheld from Respondents, was $50,152.72. This order was appealed by Respondents to the Tax Court.

On February 13, 1950, four years and four months after this order, Petitioner brought suit in the Northern District of Ohio for the principal amount due, and also for interest at the rate of 6% per annum (R. 2-4). Respondents' Answer (R. 9-10) set forth that they were entitled to a deduction from the renegotiation refund, for a respread of special-amortization costs, and that their appeal was pending in the Tax Court. They asked further that the interest rate be fixed at 2½% per annum as the proper damage to Petitioner for the loss of the use of the money. Within five months after the filing of the action Respondents paid to the Government the principal amount of the unilateral order. On February 19, 1951, the District Court, upon undisputed facts (R. 12), entered judgment in favor

of Petitioner in the sum of $6,348.14, being interest at 3% per annum to the date of payment.

Petitioner appealed this judgment to the Court of Appeals for the Sixth Circuit and that Court affirmed the District Court, for the reasons set forth in its opinion (R. 19-23).

REASONS FOR DENYING THE WRIT.

1. The issue involves only the Second Renegotiation Act of 1943, and profits made before December 31, 1945. The present Renegotiation Act of 1951 provides (50 U. S. C. App. Sec. 1215 (b) (2)) that renegotiation refunds shall bear interest at 4% per annum, so that the question here raised has no bearing upon renegotiation under the modern Act. While there doubtless are a considerable number of cases still in litigation arising under the old Act, the question of the rate of interest in those cases is merely incidental and the main issues are those as to the principal amount due. Of the reported Court of Appeals cases, the instant case is the only one in which the question of the rate of interest became the only issue. This is the only case in which a manufacturer has been compelled to appear in the Court of Appeals or in this Court, upon this question alone. As Petitioner's Petition says, at page 12: "The judicial determination of the applicable interest return is generally only perfunctory and incidental to the determination of more important issues."

In each of the pending cases, as they come before their respective Courts, and are determined on their real issues, those Courts should and will, in the exercise of their judicial discretion, fix the proper interest rate, to be paid in that case. The decision of the Court of Appeals for the Sixth Circuit, and of the other Courts of Appeals which have held similarly, do not fix any general rate of interest

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to be applied. Their holdings are only that it is within the proper discretion of a Trial Court to fix the rate of interest in each case, under long established principles.

We submit that it is improbable that any manufacturer will engage in this kind of litigation with the Government, unless he has substantial differences as to the principal amount due, and that under the decision of the Court of Appeals for the Sixth Circuit, and those of three other Circuits, and many District Courts, such a manufacturer will have no assurance that the rate of interest adjudged against him will be any particular rate. It seems unrealistic to suggest, as does the Petition on page 12, that the decision in this case will "require numerous suits in a great number of District Courts merely to litigate the interest due."

Petitioner argues that fixing interest rate at 6% will encourage voluntary payment. Since we are dealing with profits and orders made many years ago, it would seem that the decisions whether to make voluntary payment have already been made; they will not now be determined by our question.

In comparison with other questions presented to this Court, this issue as to interest rates, under a law long expired, seems of small and rapidly diminishing importance.

2. The decisions of this Court have long established the basic principle that interest is awarded to a plaintiff, as compensation for his damage in failing to have the use of the money. *Young vs. Godbe,* 15 Wall. 562, 565:

> "If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of *compensation for the delay in payment.*" (Emphasis supplied.)

Royal Indemnity Company vs. United States, 313 U. S. 289, 295-7:

> "A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest *by way of damage for delay in payment of the principal,* after the due date. *And in the absence of any controlling statutory regulation the trial court is as competent to determine the amount of interest for delay as any other item of damage.* * * * Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment." (Emphasis supplied.)

The determination of the amount of these damages, for the loss of the use of the money, is, in the absence of applicable statute, within the sound discretion of the Courts, upon the facts presented to them. *Royal Indemnity Company vs. United States,* 313 U. S. 289, 296:

> "But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute, *it is for the federal courts to determine according to their own criteria, the appropriate measure of damage,* expressed in terms of interest, for nonpayment of the amount found to be due. *Board of County Commissioners vs. United States,* 308 U. S. 343, 350, 352; *Young vs. Godbe, supra,* 565; cf. *Billings vs. United States,* 232 U. S. 261, 284 *et seq.*" (Emphasis supplied.)

With the exception of cases where the Congress has established a fixed rate of interest, this Court has adhered to the principle that no arbitrary or rigid rule as to the

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rate of interest should be established by the Courts. *Board of Commissioners vs. United States,* 308 U. S. 343, 350:

> "* * * In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim ultimately derived from a federal law, thus implying a wish of Congress to collect what it deemed fairly owing according to the traditional notions of Anglo-American law, *this Court has chosen that rule as to interest which comports best with general notions of equity. United States vs. Sanborn,* 135 U. S. 271, 281; *Billings vs. United States,* 232 U. S. 261. *Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law-making.*" (Emphasis supplied.)

The Journal Entry of the District Court (R. 12) shows that:

> "Statements of facts were made by both counsel and it was found that the facts stated by each counsel were admitted by counsel for the other party * * *. There being no dispute as to the facts, it was agreed between counsel for both parties that the question of the amount of said interest be submitted to this Court for determination upon the facts as stated by counsel."

The Court of Appeals said (R. 23):

> "It is not denied that the Government during this period had adequate sources of credit through which it could obtain money at 3% interest."

The Court might well have said, as a matter of common knowledge, and judicial notice, that the Government could and did obtain billions of dollars at 2½% or less. Petitioner argues that there should be added the cost of Government "floating and servicing its loan." It might again be judicially noticed that such cost is a very small

fraction of 1%. We submit that there has not been shown any abuse of discretion by the Courts below.

The Second Renegotiation Act conferred upon the Board authority to issue regulations on certain specified and particular matters. These are set forth in this Brief under "Statutes and Regulations Involved." No authority was conferred to make a regulation as to interest rate. Unlike many other Acts of Congress, this Act contained no provisions giving general authority to issue regulations appropriate for enforcement of the Act. That the Congress specifically expressed and enumerated the powers as to regulation, which it wished to give to the Board, and did not include any general authority to make regulations other than those specified, negatives the argument that Congress meant to take from the Courts their usual and established power as to rates of interest in cases before them.

Let it be granted that the policy of Congress was speedy collection; still it was a matter for the judgment of Congress as to what was the desirable means of implementing such policy. Congress *might* have imposed a high interest rate, or it *might* have given power to the Board to issue a regulation fixing an interest rate, but it did neither. When finally it did fix an interest rate in the statute, it fixed it at 4%, thus indicating that it did not choose to try to enforce speedy collection by means of a high interest rate.

The Board obviously felt that an interest rate should have been fixed and that it should be a high one. Therefore, it assumed to issue a Regulation, in this field, in which Congress had failed to give it any authority to regulate. In the absence of such authority we believe the Regulation not to be binding upon the Courts.

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Our question is not one of a regulation interpreting ambiguous or doubtful words or phrases in the Act. Here the Act contained no word or phrase relating to interest. This Regulation was not interpretation but legislation—and legislation in a field as to which no power had been granted by Congress. The distinction was set forth by this Court in *Koshland vs. Helvering*, 298 U. S. 441, 446:

> "* * * Where the Act *uses ambiguous terms, or is of doubtful construction, a clarifying regulation* or one indicating the method of its application to specific cases *not only is permissible but is to be given great weight* by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. *But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.*" (Emphasis supplied.)

See also *Social Security Board v. Nierotko*, 327 U. S. 358, 369-370; *Miller v. United States*, 294 U. S. 435, 439-440; *Campbell v. Galeno Chemical Co.*, 281 U. S. 599, 610; *Iselin v. United States*, 270 U. S. 245, 250-251; *United States v. Standard Brewery, Inc.*, 251 U. S. 210, 219-220.

Petitioner makes some argument that, even if the regulation had been invalid before an extension or amendment of the Act in 1945, it then became valid because of a "tacit approval." The only Supreme Court cases cited for this argument deal solely with the interpretation of ambiguous or doubtful language in the statute; this is quite a different question from ours, where there is no language to interpret, and where the Board had attempted to add to, its powers one which the statute had not given it but which had been left to the Courts.

In *Iselin v. United States*, 270 U. S. 245, 250-1, this Court said of a similar question as to an administrative rule:

> "* * * The statute was evidently drawn with care. *Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it* by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.
>
> "The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, § 800 (a), c. 136, 42 Stat. 227, and the Revenue Act of 1924, Act of June 2, 1924, § 500 (a), c. 234, 43 Stat. 253; and that the administrative practice adopted in 1919 has been steadfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; *neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law.* Compare *United States v. Falk & Brother*, 204 U. S. 143; *National Lead Co. v. United States*, 252 U. S. 140, 146." (Emphasis supplied.)

When the Congress later decided to fix an interest rate, it fixed it at 4%. This makes it difficult to believe that, at a time when it amended the law, it intended to approve a 6% rate. Furthermore it indicates that the Congress did not wish to delegate to the administrative agency, the power to fix the interest rate.

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The Courts of Appeals of three Circuits have had this question presented to them, and have sustained the power of the Courts to fix a proper interest rate. *United States v. Bonnell,* 180 F. 2d 145 (C. A. 9); *United States v. United Drill & Tool Corporation,* 183 F. 2d 998 (Court of Appeals for the District of Columbia) and the instant case in the Sixth Circuit. In a fourth case, *United States v. Star Construction Company, Inc.,* 186 F. 2d 666, the Court of Appeals for the Tenth Circuit held, on an issue as to the date from which interest should begin, that the allowance of interest "rested in the discretion of the Trial Court." A number of District Courts have fixed interest rates at lower than 6%.[1]

The only Court of Appeals decision at variance with those four Courts of Appeals is *United States v. Philmac Manufacturing Co.,* 192 F. 2d 517, quoted in Petitioner's Brief. That opinion cites no authority for its novel ruling, and no reference is made to the *Iselin* case (*Iselin v. United States,* 270 U. S. 245). It contains no recognition of the narrow limitations of the power to issue regulations, conferred by the Renegotiation Act; neither the *Iselin* case nor the limitations of the statute as to regulations, were presented to that Court by the Brief for Philmac Manufacturing Company.

The reasoning, on principle, contained in that opinion, would seem to be well answered by established principles laid down by this Court, as quoted by the Court of Appeals of the Sixth Circuit in the instant case, especially at pages R. 20-22, and by the reasoning in the opinions, upon our point, of other Circuits. In the *Bonnell* case (*United*

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[1] *United States v. Clark,* 72 F. Supp. 393 (1947); *United States v. Hopkins,* 95 F. Supp. 14 (1950); *United States v. American Metal Co.,* 86 F. Supp. 533 (1949) and *United States v. Edward Valves, Inc.,* 101 F. Supp. 559.

States v. Bonnell, 180 F. 2d 145, 148) the Court of Appeals for the Ninth Circuit said:

> *"This contention is without merit because the regulations are not an administrative interpretation or construction of provisions in the Act. The Act is silent as to the allowance of interest on the recovery of excessive profits.* * * * We think the Court had discretion in the amount of interest to be allowed and that the exercise thereof was not abused." (Emphasis supplied.)

In the *United Drill & Tool Corporation* case (*United States v. United Drill & Tool Corporation,* 183 F. 2d 998, 1001) the Court of Appeals for the District of Columbia said:

> "The Government also contends that it is entitled to exact a relatively high rate of interest as a coercive measure to force speedy payment of the excess profits determined under the Act. *But this argument overlooks the nature of interest which is compensatory rather than punitive or coercive.* We cannot change interest from a means of compensation to a coercive or punitive measure, as the Government urges us to do, unless the statute so provides." (Emphasis supplied.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

AMOS BURT THOMPSON,

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September 15, 1952.

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